DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0052
Sales/Use Tax
For the Period: 2000, 2002-2005

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ISSUE

I. **Sales/Use Tax—Motorcycle Dealership**

Authority: IC § 6-8.1-5-1; 45 IAC 15-5-3; *Galligan v. Indiana Dept. of State Revenue*, 825 N.E.2d 467 (Ind.Tax 2005); 45 IAC 15-5-1; IC § 6-2.5-3-1; IC § 6-2.5-8-1; IC § 6-8.1-5-4; IC § 6-2.5-3-6; IC § 6-8.1-10-2.1

STATEMENT OF FACTS

The taxpayer is an authorized dealer of "Company X" products such as motorcycles and all terrain vehicles. In addition to selling Company X products, the taxpayer also does repair work. The taxpayer has a location in Indiana and another location in Ohio. The taxpayer was audited by the Department of Revenue. The taxpayer protested the audit. An administrative hearing was held on June 6, 2006. It should be noted that the taxpayer later (post-hearing) received a proposed retail sales tax assessment for the year 2005, and via letter asked that the Department "incorporate by reference" the 2005 proposed retail sales tax assessment. This Letter of Findings results from the hearing and the information provided by the taxpayer. More facts will be provided below.

I. **Sales/Use Tax—Motorcycle Dealership**

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC § 6-8.1-5-1(b) states in pertinent part:

> The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b)(8). 45 IAC 15-5-3(b)(7) also notes in relevant part:

> The hearing is not governed by any rules of evidence. The department is expressly excluded from the requirements of the Administrative Adjudication Act.

The Department brings this up at the outset in part because the taxpayer, in its protest letter, cites to a quotation in *Galligan v. Indiana Dept. of State Revenue*, 825 N.E.2d 467, 477 (Ind.Tax 2005) that states: "Once the taxpayer has presented a prima facie case, the duty to go forward with that evidence may shift several times." In other words, it appears the taxpayer is arguing that *Galligan*'s burden *shifting* language is applicable at the administrative hearing level.

If that is in fact the taxpayer's argument, then the taxpayer has not established that proposition. Administrative hearings at the protest level and Tax Court trials are dissimilar in several respects. Regarding hearings, a protest before the Department is "conducted in an informal manner" and is not "governed by any rules of evidence." 45 IAC 15-5-3(b)(7). The hearing's purpose "is to clearly establish the taxpayer's specific objections to the assessment and reasoning for these objections." *Id*. Taxpayers may even, "in lieu of a hearing, submit written objections to the assessment." 45 IAC 15-5-1(c).

The *Galligan* case also states that the Indiana Tax Court "reviews final determinations" of the Department of Revenue "*de novo*," and the Tax Court "is bound by neither the evidence nor the issues presented at the administrative level." *Galligan* at 472. Thus a taxpayer's protest before the Department is different from a litigated trial before the Indiana Tax Court.

The Department notes that *Black's Law Dictionary* 136 (Abridged 6th ed. 1991) also provides some guidance, since it clarifies the meaning of "burden of proof," stating in relevant part (*Emphasis* added):

> Burden of proof is a term which describes two different concepts; first, the "burden of persuasion", which under traditional view never shifts from one party to the other at any stage of the proceeding, and *second, the "burden of going forward with the evidence", which may shift back and forth between the parties as the trial progresses.*

The Department points out that when the Tax Court in *Galligan* says, "[T]he duty to go forward with [] evidence may shift several times," that language seems to track the *second concept* of "burden of proof."

Turning to the actual protest, the taxpayer states in correspondence:

> The Proposed Assessment treats [Taxpayer's] as subject to sales tax on what are claimed to be 30 [percent] of [Taxpayer's] ATV sales during the Audit Period. The audit is based solely on claimed "observations," "audit experience," "assumptions," and other claims without factual basis. The heart of the Proposed Assessment is the claim that "it is reasonable to assume that 30 [percent] of [Taxpayer's] sales occurred within Indiana" due

> to "the close proximity" of the "showroom" and [Taxpayer's] Ohio retail location. That assumption is directly at odds with the uncontested facts.

Taxpayer submitted a non-notarized and undated affidavit, that states (regarding the Ohio location): "During the Audit period, all sales of motorcycles, dirt bikes and ATVs made by [Taxpayer] were made at the Ohio retail location." Taxpayer further states:

> An application for an Ohio title was made for every motorcycle, off-road dirt bike, and ATV which was sold by [Taxpayer] during the Audit Period. Nonresidents of Ohio who purchased vehicles at [Taxpayer's Ohio location] during the Audit Period presumably would, after receiving Ohio titles for the same, use such titles for purposes of registering and licensing (and obtaining new titles from their home states, if required) the vehicles in their home states.

The taxpayer also notes, regarding the Ohio title applications, that it provided to the Department at the hearing "applications for all the vehicles sold by [taxpayer] during 2003." (Note: since it does not appear that ATV's are required to be registered and titled in Indiana, the taxpayer's presumption that Indiana would receive any tax owing at the time of "registering and licensing" does not hold).

The taxpayer's affidavit also deals with the Indiana location. The taxpayer's affidavit states:

> During the Audit Period [Taxpayer] stored some of its inventory in a facility located at [], Indiana ("Indiana Facility"). Construction began on the Indiana Facility in the mid-1990s in anticipation of moving [Taxpayer's] retail operations from Ohio to the Indiana Facility. In anticipation of that move, [Taxpayer] registered with the State of Indiana for sales tax purposes, listed the location of the Indiana Facility as a business location in advertising, and reserved an Indiana telephone number.

And further:

> The Indiana Facility was originally designed as a retail outlet. However, the plan to move [Taxpayer's] retail operations to Indiana was abandoned prior to the completion of the Indiana Facility. As a consequence, construction was never completed, and the Indiana Facility, though having a "shell" typical of a retail outlet, has an unfinished interior. At no time has the Indiana Facility had telephone service. The only phone service [Taxpayer] has with respect to the Indiana phone number is to have the telephone company transfer any calls made to that number to [Taxpayer's] Ohio retail location.

The taxpayer, in a letter, also discounts the existence of a website listing:

> The Audit Report claims that [Taxpayer] "advertises on [a motorcycle website]" as a motorcycle and ATV repair service in Indiana. [Taxpayer] has never advertised on that website, and in fact did not even know it was listed on the site prior to the issuance of the Audit Report!

Taxpayer also provides the Department with a copy of the Company X "Dealer's Sales and Service Agreement," and argues in its letter that taxpayer was "expressly prohibited from establishing or operating, whether directly or indirectly, any new, different or other location than its Ohio retail location…."

The contentions within the Audit Report can be summarized as follows: The Indiana and Ohio locations are only a few miles apart. The Department contacted the taxpayer about conducting the audit, and ultimately the taxpayer "refus[ed] to provide records" and thus the audit was based on the "best information available." The taxpayer, as noted, has a telephone listing for the Indiana location in the "2004 [] Communications Regional Telephone Directory" in the "motorcycle and motor scooters-dealer section." (It should be noted that the taxpayer's own webpage listed a telephone number with an Indiana area code as a contact number). The Audit Report also states that the taxpayer was "registered for Indiana withholding" tax, and that the taxpayer was "initially registered for retail sales tax" in Indiana (though, the Audit Report goes on to say, "the retail sales tax registration was closed" in 2001).

IC § 6-2.5-3-1 provides in part the following relevant definitions (*Emphasis* added):

> (a) "Use" means the exercise of any right or power of ownership over tangible personal property.
> (b) "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.
> (c) "*A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana* and who:
> (1) maintains an office, *place of distribution*, sales location, *sample location, warehouse, storage place, or other place of business which is located in Indiana* and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by the retail merchant or through a representative, agent, or subsidiary;
> (2) maintains a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, installs, repairs, assembles, sets up, accepts returns of, bills, invoices, or takes orders for sales of tangible personal property or services to be used, stored, or consumed in Indiana;
> (3) is otherwise required to register as a retail merchant under IC 6-2.5-8-1; or
> *(4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.*

The taxpayer comes within the ambit of this statute. IC § 6-2.5-8-1(f) also states, "A retail merchant engaged in business in Indiana as defined in IC 6-2.5-3-1(c) who makes retail transactions that are only subject to the use tax must obtain a registered retail merchant's certificate before making those transactions."

With the preceding summary of the Audit Report and the taxpayer's argument in mind, the Department notes the following: (1) the taxpayer is present in Indiana and is subject to being audited by Indiana (*See* IC § 6-2.5-3-1); (2) the taxpayer is required to make its books and records available to the Department per IC § 6-8.1-5-4; (3) taxpayer did not make its books and records available, thus a "best information available" audit was conducted per IC § 6-8.1-5-1; (4) The taxpayer meets the definition of IC § 6-2.5-3-1, and thus, as a "retail merchant" under IC § 6-2.5-3-6(c), "shall collect the tax as an agent for the state"; and (5) the taxpayer submitted evidence for one year (the copies of the 2003 Ohio title applications) but that evidence does not further the taxpayer's case since it does not tell us which state the purchaser was a resident of, and instead simply says "NR/Non-Resident—Immediate Removal" at the bottom of the page. The taxpayer's protest is denied.

Finally, the taxpayer also intimated that it was protesting the penalty (IC § 6-8.1-10-2.1), stating that the proposed penalty is "factually groundless." The taxpayer did not develop this argument, and is denied on the penalty as well.

FINDING

Taxpayer's protest is denied.

DP/BK/DK November 17, 2006